United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7263

TO BE ARGUED
BY DAVID N. ROSEN

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-7263

JOHN E. WILLIAMS,

Plaintiff-Appellant

-V.-

JOSEPH A. WALSH, ETC.

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

APPELLANT'S REPLY BRIEF

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TABLE OF CASES

ARGUMENT

Defendants have urged a pot pourri of contentions. This Reply Brief responds briefly to what we take to be defendants' major claims.

1.

Defendants first make the claim that characterization of plaintiff's claims is a matter of federal law and "appellant may not introduce analogous state law characterizations of the cause of action." Brief of Appellees at 2; See Id. at 1-3. This contention is entirely undercut by Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966) and Johnson v. Railway Express Agency, Inc., 421 U.S. 464 (1975), neither of which is cited by defendants. Federal law ordinarily follows the state law characterization of a cause of action absent some countervailing consideration of federal policy. See Appellant's Brief at 14.

2.

Next, defendants rely heavily on Madison v. Wood, 410 F.2d 564 (6th Cir. 1969), which analogized a claim of racially discriminatory demotion to a tortious injury to person or property under Michigan law, and held that a

demand for reinstatement was an equitable claim that would be barred because the "concurrent legal remedy" of damages, 410 F.2d at 567, was barred by the limitation on that type of tort action. See Brief of Appellees at 12-18, 31-33. But Swan v. Board of Education, 319 F.2d 56 (2d Cir. 1963), relied on by the Sixth Circuit in Madison, shows that Madison does not undercut plaintiff's claim. For in Swan the legal remedy whose limitation was held to control resort to equity was an Article 78 proceeding, which is the equivalent of Connecticut's mandamus. See Appellant's Brief at 11-12. Mandamus, like an Article 78 proceeding under New York law, is a legal, not equitable proceeding. Bartlett v. Rockville, 150 Conn. 428, 430 (1963); See Conn. Gen. Stats §52-485. In fact, in Connecticut, the availability of mandamus to police officer complaining of unlawful discharge has been held not merely to control the timing of an equitable claim for reinstatement but entirely to preclude any resort to equity whatever. Bartlett v. Rockville, 150 Conn. 428 (1963). Plaintiff is therefore not attempting to avoid a bar that would be placed on his legal remedy by analogizing his claim to mandamus. On the contrary, as in Swan, mandamus is a closely analogous legal cause of action under state law.

Next, defendants argue that plaintiff's claim is not analogous to mandamus under Connecticut law but to the remedy of quo warranto. This claim is certainly ill-founded. Quo warranto is a statutory proceeding, Conn. Gen. Stats. §52-491, designed to challenge the lawfulness of an incumbent office holder's title. It requires a defendant whom the plaintiff is attempting to oust from office. Meigs v. Theis, 102 Conn. 579, 595 (1925). Plaintiff is attempting to oust no one else from office. His position was not taken by another. His discharge simply created an additional vacancy in an already under-staffed police department.

Defendants' alternative objection to analogizing plaintiff's reinstatement claim to mandamus is that

> "Appellant's claim that the action be characterized as a mandamus proceeding is wrong in view of the aforementioned requirements stated in the Boyle case, supra, because the action of the police commissioners was discretionary (i.e. determine the meaning of "just cause") and the appellant has failed to establish any clear "legal right" to his position prior to the bringing of the present action."

Brief of Appellees at 4. This argument begs the question that this law suit or a mandamus proceeding would decide, namely: was plaintiff discharged illegally? If the answer to that question is no, then he is not entitled to mandamus, but not because mandamus is the wrong remedy. If on the

other hand he was discharged illegally then he does have a "clear legal right" to reinstatement and no discretion to deny him that remedy resides in the defendants.

4.

Defendants next argue that plaintiff is guilty of laches. Brief of Appellees at 8-11A. Plaintiff agrees that

> "...if the relator is otherwise entitled to the writ, it should not be denied unless he has so slept on his rights for such an unreasonable time that the delay has been prejudicial to defendant or the rights of other interested parties or the public."

Brief of Appellees at 9. He does not agree with the City's only claim of prejudice, that "the appellee City was seriously injured in that it was required to hire an additional policeman to fill appellant's vacancy due to this unreasonable delay." Brief of Appellees at 8. This assertion is entirely unsupported by the record. At a hearing on the issue of laches, plaintiff would show that vacancies have existed at the rank of patrolman in the Bridgeport Police Department continuously from the time plaintiff was discharged until the present. He has never truly been replaced, and the City has not in fact paid anyone for the services he would have performed. If it is now compelled to pay him, it will be no worse off

financially than if he had not been discharged at all, and the City's real loss--of plaintiff's services from his discharge until the present--will be neither created nor repaired by the court's judgment.

Defendants also claim, Brief of Appellees at 11, that since the claims in federal court are different from those in the state court actions, plaintiff was guilty of laches in awaiting the conclusion of the state court proceedings before bringing this action. But plaintiff pursued his claim for reinstatement on the same grounds urged here, in the Court of Common Pleas appeal, which he filed the week he was discharged, until that appeal was dismissed on the City's motion four years later. Only then was the necessity of filing a federal action for reinstatement apparent. See e.g. Hoehn v. Crews, 144 F.2d 665 (10th Cir.), cert. denied 323 U.S. 773, rehearing denied 323 U.S. 817 (1944) affirmed 324 U.S. 200 (1945).

5.

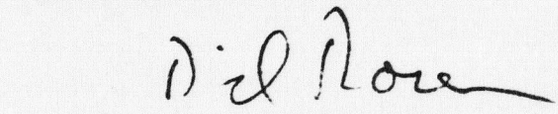
Defendants also argue that by urging the court to apply separate limitation periods to his separate claims, plaintiff is attempting to "split" his cause of action. Brief of Appellees at 19-22. Plaintiff is doing no such thing. In order to apply a period of limitation, it is

necessary to characterize a plaintiff's claim for relief, and the very joining in one action of all claims arising from a single transaction may necessitate applying different periods of limitation to different claims made in the same complaint. Periods of limitation ordinarily apply to types of claims, and if one transaction gives rise to several types of claim more than one period of limitation may apply. The cases cited in Appellant's Brief at 15-16 support this common sense proposition, and as recently as May, 1976, another Court of Appeals followed the course we urge and applied separate limitation periods to a Civil Rights Act plaintiff's separate claim. Chambers v. Omaha Public School District, 536 F.2d 222 (8th Cir. 1976); See also Polite v. Diehl, 507 F.2d 119, 112-23 (3rd Cir. 1974).

CONCLUSION

The District Court erred in holding the complaint time-barred--at least as to the claim for reinstatement. Its grant of summary judgment to defendants and dismissal of the action should be reversed and the case remanded to the District Court with directions to consider the remaining claims of the parties.

RESPECTFULLY SUBMITTED,



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CERTIFICATION

This is to certify that copies of the foregoing Appellant's Reply Brief were mailed first-class, postage pre-paid, on the 9th day of September, 1976, to:

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